he would be entitled to do notwithstanding that for so many years payments have been made on his behalf under the will. The following passage in Lord Deas' opinion in *Morison's Curator Bonis* v. *Morison's Trustees*, 8 R. 213, seems closely in point, viz.—"Now, if this had been a case in which the means of maintenance for the lunatic could not be obtained except by claiming her legal rights, or even if by asserting those rights she were to be accommodated and maintained in a style and manner superior to what she could otherwise have been, I should not have doubted that it was competent for the curator to exercise the option in the way it was reasonable to suppose the lady herself would have exercised it had she been sane."

The most plausible objection on behalf of the third parties was that they were prepared to make up the ward's annual income to £100 a-year, and that therefore there was no necessity for election. But I do not think that either the curator or the Court is bound to entertain such an alternative. If the provision under the will is insufficient for the ward's maintenance, the proper alternative is that the curator should elect to claim legitim on behalf of the ward.

The next question is, whether the legitim fund falls to be divided by four or by three. The third parties, representing the heir, maintain that they are to be considered as entitled to a share of the legitim. It might be a sufficient answer that even now the third parties have not reprobated the settlement and elected to collate. But I think it is sufficient that John M'Call junior, who was *sui juris*, and indeed managed the whole estate, sufficiently made his election to take under the will by selling part of the heritage and transacting with those of the children who accepted provisions under the will.

It is true that no claim for legitim was made during his lifetime by the younger children, but the heir must be held to have known that it was still open to the ward or his curator to do so.

On the question of interest, I do not think that more should be allowed than the trust funds yielded—probably 3 per cent. would be sufficient.

The Court answered the first question in the affirmative, found in answer to the second question that William M'Call was entitled to share in the legitim fund to the extent of one-third, found it unnecessary to answer the third question, and found in answer to the fourth question that the second party was entitled to interest on his ward's share, but only at such rate as the estate in the hands of the trustee had been yielding.

Counsel for the First and Third Parties—C. D. Murray. Agent—F. J. Martin, W.S.

Counsel for the Second Parties—A. O. M. Mackenzie. Agents—J. & J. Ross, W.S.

Thursday, July 18.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

MACDONALD *v.* M'COLL.

Reparation—Slander—Privilege—Malice—Averment of Facts and Circumstances Inferring Malice—Innuendo—Master and Servant—Character Inconsistent with Previous Certificate.

In an action of damages for slander brought by a barman against a former master, the pursuer averred that after four years' service with the defender he got a certificate of character from him to the effect that he had left of his own accord, and that the defender had always found him sober, honest, and trustworthy; that about a year after the granting of this certificate the pursuer applied to an hotel-keeper for employment, that the hotel-keeper took him temporarily into his service, and wrote to the defender requesting to be informed as to the pursuer's honesty, sobriety, and ability as bartender, that in answer to this inquiry the defender wrote a post-card in these terms: "*Re* yours of yesterday—no good;" that the statement by the defender in said post-card regarding the pursuer was false and calumnious; that its falsity was well known to the defender; that it was made by the defender recklessly, maliciously, and without probable or any cause; that in consequence thereof the pursuer had lost his situation; and that the defender intended to represent that he was not honest and sober and able to perform the duties of a bartender, and that he was a worthless character, and was not a fit and proper person to fill the post for which he had applied. The defender pleaded that the action was irrelevant, upon the ground that the statement complained of was plainly privileged, and that the pursuer had failed to aver facts and circumstances inferring malice. *Held* (1) That the expression in the post-card was capable of bearing the innuendo put upon it; (2) that the occasion was undoubtedly privileged, and that malice must consequently be relevantly averred; and (3) that the discrepancy between the certificate granted by the defender when the pursuer left his service and the character given by him a year later, was such a special circumstance as to require explanation, and if not explained to entitle a jury to infer malice; that the pursuer's averments were consequently relevant, and that he was entitled to an issue.

Opinions (*per* the Lord President and Lord Kinnear, approving opinion of Lord Kyllachy in *Sheriff* v. *Denholm*, December 18, 1897, 5 S.L.T. case 309, p. 234), that as a general rule where a defamatory statement is made in

pursuance of any definite and special duty, whether to the public or to an individual, or in the exercise of any right, facts and circumstances must be averred from which malice may be inferred.

Joseph Macdonald, barman, Partick, brought an action of damages for slander in the Sheriff Court at Glasgow against William M'Coll, wine and spirit merchant there.

The pursuer averred that he had been four years in the employment of the defender as barman, and that when he left that employment on 6th February 1899 the defender gave him a certificate of character stating that the pursuer had been for four years in the defender's employment, that the pursuer had left of his own accord, and that the defender had always found him sober, honest, and trustworthy.

The pursuer further averred as follows:—"(Cond. 3) In the month of February 1900 the pursuer applied to Mr David Black, Queen's Hotel, Grangemouth, for a situation as bartender, and in view of the certificate given to him by the defender, the pursuer referred the said Mr Black to the defender as to his character and capacity. In the meantime the pursuer entered the service of the said David Black, who on the 16th February wrote a letter to the defender, stating that the pursuer had applied to him for a situation and had referred him to the defender. In the said letter Mr Black requested the defender to inform him regarding the pursuer's honesty, sobriety, and ability as bartender. (Cond. 4) In reply to the said David Black's letter of 16th February 1900 the defender sent, or caused to be sent, a post-card addressed to the said David Black, and dated 17th February 1900. It is in these terms—'Dear Sir—*Re* yours of yesterday—no good.—Yours truly, Wm. M'Coll.' . . . Immediately on receiving this post-card the said David Black dismissed the pursuer from his employment." The pursuer also averred (Cond. 5) that the words "no good" in the post-card sent by the defender to Black were of and concerning the pursuer, and represented that the pursuer was not honest and sober, that he was not able to perform the duties of bartender, and that he was a worthless character and unfit to fill the post for which he had applied. "The statement by the defender in the said post-card regarding the pursuer was false and calumnious. Its falsity was well known to the defender. It was made by the defender recklessly, maliciously, and without probable or any cause. (Cond. 6) In consequence of the false and malicious statement aforesaid made by the defender, the pursuer lost his situation as bartender."

The defender pleaded, *inter alia*—"(1) The pursuer's averments being irrelevant, ought not to be admitted to probation. (3) Any communication made by the defender being privileged, decree of absolvitor should be granted."

On 10th July 1900 the Sheriff-Substitute (Strachan) sustained the defender's first plea-in-law, and dismissed the action.

The pursuer appealed to the Sheriff (Berry), who on 30th January 1901 adhered.

Note.—"I take it not to be disputed that, as a general rule in cases of privilege like the present, it is necessary for the pursuer to aver facts and circumstances inferring malice in order to make a relevant case. It is not sufficient to aver generally that the statement complained of was made maliciously and without probable cause. Here, however, it is said that the apparent inconsistency between the favourable certificate of character given by the defender to the pursuer when he left his service and the words 'no good' in his post-card to the person proposing to employ the pursuer, should be regarded as sufficient to raise the inference of malice. It is difficult, if not impossible, to reconcile the two statements; but on consideration I have come to be of opinion that the inconsistency is not enough to support the action. The defender may well, although no doubt improperly, have been induced to give a favourable certificate out of good feeling, and from a desire to help the pursuer, but when appealed to by another person proposing to employ him, he may have thought himself bound to say what he believed to be true."

The pursuer appealed, and argued—A bare averment of malice was sufficient in the circumstances, and the pursuer was entitled to an issue based on the terms of the postcard itself without any innuendo—*Laidlaw* v. *Gunn*, January 31, 1890, 17 R. 394; *Farquhar* v. *Neish*, March 19, 1890, 17 R. 716; *Beaton* v. *Ivory*, July 19, 1887, 14 R. 1057, *per* the Lord President at p. 1061; *M'Fadyen* v. *Spencer & Co.*, January 7, 1892, 19 R. 350; *Reid* v. *Moore*, May 18, 1893, 20 R. 712, *per* Lord Trayner at p. 718; *Innes* v. *Adamson*, October 25, 1889, 17 R. 11; *M'Murchy* v. *Campbell*, May 21, 1887, 14 R. 725. In the cases in which averments of special facts and circumstances had been desiderated the statements complained of had been uttered in discharge of a public duty, but there was no public duty in the present case. The defender, by the certificate granted when the pursuer left his service, invited the pursuer to go to him for a character if he wanted one, and the pursuer had relied upon that invitation. In any view, however, the pursuers had averred special facts and circumstances inferring malice. The postcard could reasonably bear the innuendo put upon it.

Argued for the defender—The innuendo which the pursuer sought to attach to the defender's post-card to Black was not reasonable, and the occasion on which it was written was privileged. As in the cases where the statements complained of were uttered in discharge of a public duty, so also when statements are made in discharge of a private duty, special facts and circumstances must be averred—*Scott* v. *Turnbull*, July 18, 1884, 11 R. 1131; *Farquhar* v. *Neish*, 17 R., *ut supra*, *per* Lord Lee at p. 719; *Ingram* v. *Russell*, June 8,

1893, 20 R. 771; *Sheriff* v. *Denholm*, December 18, 1897, 5 S.L.T., Case 309, p. 234, and March 4, 1898, Case 437, p. 346.

LORD PRESIDENT—It appears to me that the general rule to be derived from the decisions as to the circumstances under which the pursuer of an action of damages for defamation is bound to allege facts inferring malice, in addition to alleging that the statement complained of was made maliciously, is very well stated by Lord Kyllachy in the case of *Sheriff* v. *Denholm*, in which his Lordship said that the rule which requires a statement of such facts and circumstances must now be taken to apply generally "to all cases where a defamatory statement is made in pursuance of any definite and special duty, whether to the public or to an individual, including any duty owed to the aggrieved person himself." It might be proper to add to this statement of the rule the words "or in the exercise of any right."

The question therefore comes to be, whether there is anything in the circumstances of this case to displace the general rule that it is not enough merely to allege that the words complained of were written maliciously, in respect that the circumstances appearing on the record call for explanation on the part of the defender.

It is a very special circumstance in this case that on the pursuer leaving the employment of the defender the defender gave him a certificate in which he stated that the pursuer had been four years in his employment and had left of his own accord, as also that he had always found him sober, honest, and trustworthy. That is certainly a very absolute recommendation, and it has to be compared with what the defender wrote on 17th February 1900—a little more than a year later. His letter of that date was written in reply to a letter from Mr Black, and a copy of Mr Black's letter is produced and referred to. It is in these terms—"Mr Joseph Macdonald has applied to me for a situation, and has given me your name as reference. You might please let me know as to his honesty, sobriety, and his ability as bar-tender. Any information you may give me will be treated as strictly confidential." Anything said in reply to such an inquiry as that would, under ordinary circumstances, have a large measure of privilege. The defender's answer is—"*Re* yours of yesterday—no good," which plainly means that the pursuer is no good as a bar tender. The important question seems to me to be, whether the apparent discrepancy between that reply and the certificate given a year before is not such as to call for some explanation from the defender, and I am of opinion that it is.

The apparent discrepancy seems to me to be such a special circumstance as the defender may reasonably be called upon to explain. I therefore think that the requisite exception is here made out upon averment, and that we should allow the case to go to a jury.

LORD ADAM—The question being whether or not there is a relevant case to go to a jury we must have regard to the averments of the pursuer—[*His Lordship here narrated the material averments*]. The first thing to consider is, whether Mr Black's letter and the defender's reply will bear that innuendo. If not—if they are not capable of bearing that innuendo—then there is an end of the case. In my opinion, however, they are capable of bearing that innuendo. If so, then it is for the jury and not for us to say whether it is proved that that is their true meaning. Meanwhile we must take the case on the assumption that that is the true meaning to be drawn from the expression used. If that is so, then we have under the hand of the defender on the 6th February 1899 a statement that the pursuer had been for four years in his employment, that he had left of his own accord, and that he (the defender) had always found him sober, honest, and trustworthy; and then we also have, after an interval of little more than a year, a statement that the pursuer is not honest and sober, that he is a worthless character, and not a fit and proper person to fill the post for which he had applied. Accordingly we have here two statements by the defender within a comparatively short time of each other entirely contradictory. That seems to me to require some explanation. The defender may no doubt have a very satisfactory explanation, but that is for the jury to say—not for us. So far as pleading goes, the defender, in considering the present question, cannot be heard to say, "The first certificate which I granted was false, and I knew it to be false, and that is why I wrote the postcard." Some explanation is required. On the face of it, if no explanation were offered, then one of the inferences which a jury might be entitled to draw would be, that in writing the postcard the defender was acting maliciously. If Mr Black had simply written asking what is the pursuer's character, and had got the answer which he did, "that he was no good," that would have been just an ordinary privileged case, and unless there was something stated on record to displace that and to show that he was not simply acting in the discharge of a duty, it might have been necessary to have alleged special facts and circumstances inferring malice. But that is not the present case, for here we have on the face of the proceedings an entirely unexplained contradiction, which differentiates this case from those in which particular averments instructing malice were desiderated.

LORD KINNEAR — I am of the same opinion.

I agree with Lord Adam that the first question to consider is, whether the letter will bear the innuendo which the pursuer puts upon it, and I agree with him also, but without expressing any opinion at present as to the precise words which should enter the issue, that it is sufficient that the letter is clearly capable of bearing that innuendo. The letter therefore for the purposes of this discussion must be taken to mean that the defender has alleged

against the pursuer that he is not sober, not honest, and not trustworthy, and not able to perform the duties of a bartender. Now, I have no doubt that that statement was made on a privileged occasion, for the letter was written in answer to an inquiry made at the defender by request of the pursuer himself. It was upon his reference to the defender that Mr Black wrote to him for a character, and it was in answer to that inquiry that the alleged slander was uttered. I have no doubt therefore that the occasion being privileged the pursuer must undertake to prove malice. The only question remaining is, whether there is a sufficiently relevant averment of malice. As to the law on this subject, I entirely agree with the doctrine laid down by Lord Kyllachy, subject to the qualification proposed by your Lordship in the chair. The question is how it applies to the present case? If there was nothing alleged on record which could be said to indicate malice, I should be very clearly of opinion, having regard to the privilege, that the pursuer could have had no issue. But the rule requiring specific averments of malice merely comes to this, that when a person, who is privileged, and on a privileged occasion, says of another what is not true in fact, nevertheless he is presumed to have said it in good faith in the performance of a duty or in the exercise of a right, unless there is some averment made on record which displaces that assumption. I agree that there are such averments in the present case. The pursuer says he was in the defender's employment for four years till 6th February 1899, when the defender gave him the certificate which has been referred to, and that in February 1900 the defender, being asked for a character, gave the defamatory character which he complains of. The pursuer says that was not founded upon any experience the defender had of his conduct and character while in his employment, because he has it under the pursuer's hand that he found him honest, sober, and trustworthy.

Now, if the defender's first character of the pursuer contained in the certificate is taken to be true, and it is found that in the following year he says he is the reverse, the pursuer is entitled to say that that, being founded not on any experience the defender had, must be founded on ill-will. The defender may be able to explain that in the witness-box, it may be, that he gave an unduly favourable character at first out of good nature; but all that it is necessary for us to say now is, that the averment the pursuer makes is such as to require explanation, and we should not be at all sure of doing justice if we did not send this case to a jury and give the pursuer an opportunity of proving his averments.

The pursuer will have to satisfy the jury not only that the letter will bear the innuendo put upon it, but that it was written maliciously.

I do not think the decision your Lordship proposes is in conflict with any previous case, and I am satisfied that it is not inconsistent with the general rule of law explained by your Lordship in the chair.

LORD M'LAREN was absent.

The Court sustained the appeal, recalled the interlocutors of the Sheriff-Substitute and of the Sheriff, repelled the first plea-in-law for the defender, and ordered issues.

Counsel for the Pursuer and Appellant—Salvesen, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defender and Respondent—A. S. D. Thomson—A. M. Anderson. Agent—W. C. B. Christie, W.S.

Friday, July 19.

FIRST DIVISION.

COUNTY COUNCIL OF DUMBARTONSHIRE *v.* CALEDONIAN RAILWAY COMPANY.

Police — Water Supply — Special Water Supply District — Burgh within Water District — Assessment — Mode of Assessment — Canal Intersecting District and Burgh — Public Health — Public Health (Scotland) Act 1897 (60 *and* 61 *Vict. cap.* 38), *secs.* 134, 135, *and* 136.

Section 134 of the Public Health (Scotland) Act 1897 provides that "in any burgh, or where any special water supply district has been formed," the expense incurred in obtaining water supply "shall be paid out of a special water assessment which the local authority shall raise and levy on and within such burgh or special district, in the same manner . . . as hereinafter provided for the Public Health General Assessment."

Section 135 provides, "with respect to districts other than burghs," that the Public Health General Assessment shall be levied at a uniform rate on all lands and heritages within such district.

Section 136 provides, "with respect to burghs subject to the provisions of the Burgh Police (Scotland) Act 1892, or having a local Act for police purposes," that in raising the said assessment the annual value of certain subjects, *inter alia*, canals, shall be taken to be one-fourth of the value appearing in the Valuation Roll.

In 1874 a part of the parish of K. was formed into a special water supply district. In 1886 a portion of the said district was erected into the burgh of C., in terms of the General Police and Improvement (Scotland) Act 1867. In 1898 a special water supply assessment was imposed upon all the lands and heritages within the said special water supply district. In a special case between the County Council, as the local authority imposing the rate, and the owners of a canal which intersected the water supply district and the burgh of C., *held* that the special water supply assessment imposed by the County